

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Optical E.T.C., Inc. ) ASBCA No. 53350  
 )  
Under Contract No. N66001-95-C-0033 )

APPEARANCE FOR THE APPELLANT: Mr. Arthur H. Werkheiser  
Vice President

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OPINION BY ADMINISTRATIVE JUDGE MOED

This appeal relates to a cost-plus-fixed-fee, incrementally funded, services contract which was terminated for the convenience of the government. The termination settlement proposal (TSP) submitted by appellant (OETC) requested cost reimbursement and fixed fee allowance in a total amount exceeding the funds allotted to the contract. The contracting officer denied the claim for the excess amount on the ground that the government's liability for payments under the contract was limited to the total amount allotted to the contract. The parties have agreed that the dispute should be decided on a documentary record, without a hearing, pursuant to Rule 11.<sup>1</sup> The decision relates to both entitlement and quantum.

FINDINGS OF FACT

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<sup>1</sup> The parties have submitted several supplements to the record. Appellant's supplements A-J have been re-tabbed as Rule 4, tabs 16-25. The other supplements have been tabbed as Rule 4 file documents as follows: the government's responses, dated 10 June 2002, to appellant's first discovery request (tab 26); appellant's reply to the government's first discovery request (including tabs 1-8) (tab 27); Appendix D to the Government's initial brief (tab 28); documents submitted by appellant's letter dated 23 September 2003 (tabs 29-61); Documents submitted with the government's letter of 14 October 2003 (tabs 62-67).

1. This contract (R4, tab 1 (hereinafter “contract”)) was awarded on 28 September 1995 on a cost-plus-fixed-fee, incrementally funded basis, for performance of engineering services and delivery of data (hereinafter “contract services”) related to development of a dynamically programmable real-time infra-red (RTIR) test set. (R4, tab 1 at B-1) Contract Line Items (CLINs) Nos. 0001 and 0002 were for contract services performed during the initial, firm, contract period (hereinafter “base period”) (contract at B-1, F-1). CLINs 0003-0006 related to Option Nos. 1 and 2 granted to the government for acquisition of additional contract services (contract at B-2). Both options were exercised (R4, tabs 4, 9).

2. Among the standard clauses included in the contract were: FAR 52.216-7, ALLOWABLE COST AND PAYMENT (JUL 1991); FAR 52.216-8, FIXED FEE (APR 1984); FAR 52.249-6, TERMINATION (COST-REIMBURSEMENT) (MAY 1986); and FAR 52.232-22, LIMITATION OF FUNDS (APR 1984) (LOF clause).

3. Clause B-4, ESTIMATED COST AND FIXED FEE, as modified in contract Modification Nos. P00010 and P00011, was as follows:

	<u>Estimated Cost</u>	<u>Fixed Fee</u>	<u>Total</u>
Base Period	\$449,038	\$26,782	\$475,820
Option No. 1	\$569,512	\$32,063	\$601,575
Option No. 2	\$483,661	\$31,498	\$515,159

(Contract at B-2; R4, tabs 11, 12). In the record, the Base Period, Option No. 1, and Option No. 2 are sometimes referred to by OETC as Phases I, II, and III, respectively (R4, tab 43).

4. Clause H-57, LIMITATION OF LIABILITY stated that the contract was to be incrementally funded. The amount allotted to the contract upon award was \$125,000, inclusive of fixed fee. The total amount eventually allotted to the contract was \$1,186,222, in the following increments:

<u>Amount Allotted</u>	<u>Contract Provision</u>	<u>Date</u>	<u>Total Amount Allotted</u>	<u>Total Allotted to Cost</u>	<u>Total Allotted to Fee</u>
\$125,000	Clause H-58	9/28/95	\$125,000	\$117,975	\$7,025
\$240,000	Mod. No. P00001	2/20/96	\$365,000	\$34,487	\$20,513
\$205,000	Mod. No. P00003	5/30/96	\$570,000	\$537,891	\$32,109
\$152,000	Mod. No. P00005	7/24/96	\$722,000	\$681,227	\$40,773
\$15,000	Mod. No. P00007	9/24/96	\$737,000	\$695,372	\$41,628
\$25,000	Mod. No. P00008	12/30/96	\$762,000	\$718,844	\$43,156
\$380,000	Mod. No. P00009	1/21/97	\$1,142,000	\$1,076,840	\$65,160

\$40,238	Mod. No. P00010	1/27/98	\$1,182,238	\$1,117,041	\$65,197
\$3,984	Mod. No. P00011	4/20/98	\$1,186,222	\$1,120,775	\$65,447

(R4, tabs 1, 4, 6, 9-12)

5. The contract was terminated in its entirety for the convenience of the government on 19 May 1998, effective on 27 May 1998 (R4, tab 13). By letter of 1 June 1998, the PCO delegated, to the Defense Contract Management Command, Birmingham, AL (DCMC), the authority “as provided in [FAR] 42.302(a)(23)” to “negotiate a termination settlement for [this contract].” Copies of the contract and unspecified “back-up and correspondence” were enclosed with that letter. (R4, tab 14)

6. On 7 May 1999, OETC submitted a written TSP to the designated termination contracting officer (TCO) at DCMC (R4, tab 22). The TSP contains the Settlement Proposal for Cost-Reimbursement Type Contracts (Standard Form 1437) which sets forth a net proposed settlement in the amount of \$1,249,818. That includes \$1,141,695 shown as “total costs.” The types and amounts of costs comprising that total are set forth in the submitted Standard Form 1437. Payments to OETC totaling \$1,186,222 were applied against the net proposed settlement amount of \$1,249,818, resulting in a net requested additional payment of \$63,596. (R4, tab 22 at 3)

7. OETC modified the TSP in several respects by letter dated 31 October 2000 (modified TSP) (R4, tab 16). The modified TSP sought an additional payment of \$47,116 based on a net proposed settlement of \$1,233,338. That amount consisted of: (a) costs incurred prior to termination (hereinafter “pre-termination costs”) totaling \$1,139,843; (b) fixed fee of \$65,447; (c) termination settlement expenses in the amount of \$28,548; and (d) a credit of \$500. (R4, tab 16)

8. The pre-termination costs of \$1,139,843 claimed in the modified TSP were comprised of: (a) “total costs” of \$1,115,748; and (b) indirect cost adjustments totaling \$24,095. The net proposed settlement of \$1,233,338 included a credit of \$500 to the government for cost-reimbursed materials to be retained by OETC.

9. The claimed amounts of pre-termination costs are not borne out by the record which shows incurred pre-termination costs totaling \$1,143,785. That amount is comprised, first, of costs incurred, through 30 April 1998, in the amount of \$1,133,794. These costs were set forth in cost reports submitted by OETC as part of Voucher Nos. 1-30 for cost reimbursement and payment of fixed fee. That amount includes \$14,430 for indirect cost adjustments. The other elements are incurred costs for May, 1998 of \$326 (R4, tab 27 at subtab 3) and additional indirect cost adjustments in the amount of \$9,665 (finding 17). Based on incurred pre-termination costs of \$1,143,785 and a total of

\$1,120,775 allotted for cost reimbursement, OETC incurred excess pre-termination costs of \$23,010.

10. Actual payments to OETC consisted of \$1,114,573 for cost reimbursement and \$71,649 for fixed fee payment, for a total of \$1,186,222. These amounts are derived from Voucher Nos. 1-29 showing invoiced amounts of costs submitted for reimbursement and requested payments of fixed fee (R4, tab 27 at subtab 3) and a tabulation, in the record, of payments made (R4, tab 15 attach. at 6). These data show that with the exception of Voucher No. 29, costs were provisionally reimbursed in the amounts claimed. In the case of Voucher No. 29, claimed costs of \$17,016 were reimbursed only to the extent of \$1,415 so as to not to cause the total of payments under the contract to exceed \$1,186,222, the total amount allotted to the contract.

11. In a letter dated 20 November 2000 (R4, tab 15 attach. 1), the TCO denied the request in the modified TSP for convenience termination settlement in excess of the total amount of \$1,186,222 allotted to the contract (finding 4). The TCO stated that the PCO had declined to allot additional funds to cover the excess amount. The TCO stated that a payment in excess of the allotted amount was barred by the LOF clause on two bases. The first was that OETC had never “issued a proper notice under” the LOF clause that costs would exceed the funds allotted to the contract. The second was the absence of an increase in funding (see finding 15).

12. The LOF clause provides, in part, as follows:

(c) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of . . . the total amount so far allotted to the contract by the Government . . . . The notice shall state the estimated amount of additional funds required to continue performance for the period specified in the Schedule.

(d) Sixty days before the end of the period specified in the Schedule, the Contractor shall notify the Contracting Officer in writing of the estimated amount of additional funds, if any, required to continue timely performance under the contract or for any further period specified in the Schedule or otherwise agreed upon, and when the funds will be required.

13. In a letter dated 7 December 2000 (R4, tab 24), OETC responded to the TCO’s refusal to reimburse the costs in excess of the allotted funds (finding 11), by asserting that it had provided the information required by the LOF clause in the form of monthly cost

reports. These reports had been submitted during the regular course of the contract as part of the monthly vouchers for reimbursement of costs and fixed fee payment (R4, tab 24 at 4). These reports detailed the costs incurred for the billing period and cumulatively for the elapsed period of the contract (R4, tab 27 at subtab 3). The last such report was contained in Voucher No. 30, relating to the period ending 30 April 1998 (R4, tab 27 at subtab 3). Copies of the vouchers, including the cost report, were sent to the PCO, simultaneously with transmittal to the DCAA auditor. That was the case for Voucher No. 29, dated 3 May 1998, relating to the period ending 31 March 1998. (R4, tab 27 at subtab 3)

14. The data as to incurred costs set forth in the table below is derived from the cost reports. The table shows that during the period August, 1997 - April, 1998, OETC's incurred costs continuously exceeded 75 percent of the amounts of cost allotted to the contract. The cost reports, however, did not state the estimated amount of additional funds required for continued performance of the contract, as called for in the LOF clause (finding 12).

Voucher No.	Period Ending	Total Incurred Costs <sup>2</sup>	Total Amount Allotted to Cost <sup>3</sup>	75% of Total Amount Allotted to Cost
21	6/30/97	\$801,632	\$1,076,840	\$807,630
22	7/31/97	\$853,736	\$1,076,840	\$807,630
23	8/31/97	\$888,316	\$1,076,840	\$807,630
24	9/30/97	\$933,777	\$1,076,840	\$807,630
25	10/31/97	\$987,781	\$1,076,840	\$807,630
26	11/30/97	\$1,069,295	\$1,076,840	\$807,630
27 <sup>4</sup>	1/31/98	\$1,096,809	\$1,117,041	\$837,781
28	2/28/98	\$1,113,162	\$1,117,041	\$837,781
29	3/31/98	\$1,130,178	\$1,117,041	\$837,781
30	4/30/98	\$1,133,794	\$1,120,775	\$840,581

(R4, tab 27 at subtab 3)

15. A second basis for the TCO's refusal to reimburse costs in excess of allotted funds was the absence of an increase in said funds to cover the excess amount (R4, tab 15 attach. at 7) In that regard, the LOF clause provides as follows:

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<sup>2</sup> The amounts in this column reflect our corrections of mathematical errors in the cumulative amounts shown in the cost reports.

<sup>3</sup> See Finding 4.

<sup>4</sup> Voucher No. 27 covers the two-month period 1 December 1997 – 31 January 1998.

(f) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause —

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of . . . the amount then allotted to the contract by the Government . . . until the Contracting Officer notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the Government to this contract.

....

(h) No notice, communication, or representation in any form other than that specified in subparagraph (f)(2) above, or from any person other than the Contracting Officer, shall affect the amount allotted by the Government to this contract. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the total amount allotted by the Government to this contract, whether incurred during the course of the contract or as a result of termination.

#### Indirect Cost Adjustment

16. OETC was reimbursed under the contract for the indirect costs of material handling (M/H), overhead (O/H), and general and administrative costs (G&A). Reimbursement was initially made on the basis of provisional rates. DCAA approved final rates after the end of each OETC fiscal year (FY) (1 November - 31 October) occurring during the term of the contract. For each of those years, the final rates approved by DCAA were higher in most cases than the provisional rates, resulting in added incurred costs under the contract. Those added costs, referred to as “indirect cost adjustments,” totaling \$24,095, are part of the pre-termination costs of the contract.

17. Final indirect rates for FYs 1995 and 1996 were approved by DCAA prior to 3 December 1997 (R4, tabs 18, 27 at subtab 3 (voucher No. 26), at subtab 5, p. 7, tab 68). The difference between the provisional and final rates for those years resulted in an indirect

cost adjustment of \$14,430 which was billed and paid under Voucher No. 27, dated 4 March 1998 (R4, tab 27, subtab 3). The record identifies the date of approval of the final rates for FY 1997 only as no later than 24 July 2000 (R4, tab 66). The final rates for FY 1998 were approved on or about 20 December 2000 (R4, tab 68). The difference between the provisional and final rates for FYs 1997 and 1998 resulted in an indirect cost adjustment of \$9,665 which was first reported and claimed in the modified TSP (R4, tab 16 at 1).

18. The provisional and final rates for M/H and O/H for FYs 1995-1998 and the differentials were as follows:

<u>FY</u>	<u>M/H</u> <u>(Provisional)</u>	<u>M/H</u> <u>(Final)</u>	<u>M/H</u> <u>Differential</u>	<u>O/H</u> <u>(Provisional)</u>	<u>O/H</u> <u>(Final)</u>	<u>O/H</u> <u>Differential</u>
1995	.06	.046	-.014	.52	.569	+.049
1996	.054	.054	-0-	.603	.628	+.025
1997	.054	.042	-.012	.631	.655	+.024
1998	.084	.0974	+.0134	.635	.6097	-.0253

(R4, tabs 18, 27 at subtab 5 at 7, tab 68)

19. The provisional and final rates for G&A for FYs 1995-1998 and the differentials were as follows:

<u>FY</u>	<u>G&amp;A</u> <u>(Provisional)</u>	<u>G&amp;A</u> <u>(Final)</u>	<u>G&amp;A</u> <u>Differential</u>
1995	.03	.05	+.02
1996	.022	.048	+.026
1997	.041	.044	+.003
1998	.045	.05	+.005

(R4, tabs 18, 27 at subtab 5, p. 7, tab 68). OETC has not made any showing as to whether the final rates for FYs 1997 and 1998 could reasonably have been foreseen during performance of the contract.

Remaining Excess Pre-Termination Costs

20. The record does not identify the cause(s) of the remaining excess pre-termination costs in the amount of \$13,345. OETC's position during the termination settlement negotiations was that it was entitled to reimbursement of costs in excess of allotted funds because it had performed changed work directed by the Government with "reasonable expectations" of additional funding. OETC alleged that the contracting officer's representative (COR), Ms. Rowena Carlson, and the RTIR project manager, Mr. D. N. Williams, ordered work scope changes. OETC alleged that the RTIR program office thereafter "knowingly allowed OETC to approach exhaustion of allotted funds while providing OETC encouragement that funds would be made available shortly" which OETC says never occurred. (R4, tab 24 at 4)

21. The directions for work scope changes were apparently issued during a quarterly technical progress meeting, held on 22-23 January 1997 (R4, tab 24, tab 27, subtab 3 at progress reports for January, February 1997). According to OETC, two directions were issued. First, it was directed to "prepare the 256 by 256 TPA [thermal pixel array] carrier requirements, design, and identification of a suitable vendor and to arrange for the manufacture of TPA carriers. Second, OETC was directed to construct a portable infrared test set containing a 64x64 TPA. OETC was told to "immediately begin working" and "the paperwork would follow." The contract administrator would be requested to "effect the needed changes." (R4, tab 24 at 3)

22. OETC says that it repeatedly asked the COR for prompt action concerning issuance of contract modifications reflecting these changes and provision of additional funding and was told that "it will be taken care of." OETC asserts that when it inquired of the contract administrator concerning the status of the contract modifications confirming these scope changes, it was told that no instructions concerning the same had been received from the COR. (R4, tab 24 at 3, 4)

23. The contract contained several provisions stating that the COR was not authorized to issue changes. The Contract Administration Plan (Attachment 3 to the contract) lists various specific duties of the COR. The following is set forth at the end of that list:

The above listed items do not authorize the COR to take any action, either directly or indirectly that could result in a change in pricing . . . or any other term or condition of the contract. In addition, the COR is not allowed to direct the contractor to perform any action which exceeds the scope of the basic contract. Whenever there is a potential that discussion may impact the areas described above, the Contracting Officer is to be contacted for further guidance.

24. Clause H-26, ¶ (b) of the contract, titled DESIGNATION OF COR, provides in part as follows:

When/if, in the opinion of the Contractor, an effort outside the existing scope of the contract is requested, the Contractor shall promptly notify the PCO in writing. No action shall be taken by the Contractor unless the PCO or ACO has issued a contractual change.

25. The contract also includes DFARS 252.201-7000, CONTRACTING OFFICER'S REPRESENTATIVE (DEC 1991), ¶ (b) of which states, in part, that "[t]he COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract."

26. By letter, dated 11 March 1997 (R4, tab 43), the PCO, Mr. George Petersen, issued various changes to the contract work scope. The changes were stated separately for the Base Period, Option No. 1 and Option No. 2. The changes to work under Option No. 1 included several tasks relating to the 256x256 TPA which had been the subject of directions issued previously by the COR. The PCO confirmed the directions issued by the COR to the extent of noting that the design of the item had already been accomplished. The letter of 11 March 1997 makes no reference to the other additional work ordered by the COR relating to the portable infrared test set containing a 64x64 TPA (finding 21) and there is no indication in the record that this work was actually performed. So far as can be ascertained from the record, neither the directions issued by the COR or the changes set forth in Mr. Petersen's letter of 11 March 1997 were ever issued in formal written modifications of the contract nor were additional amounts allotted to the contract specifically for the costs of those directions and changes.

27. OETC submitted monthly technical progress reports to the RTIR program office, with copies to either the COR or the PCO. The last such report in the record is for October, 1997. The reports indicate that during February-October 1997, OETC was engaged in various activities relating to the 256x256 TPA. (R4, tab 27 at subtab 3; tabs 35-39). The extent to which work relating to the 256x256 TPA was subsequently performed cannot be determined from the record.

28. The technical progress report for October, 1997 states that "[e]ffort continued on the design of the 256x256 array" and was planned to continue "to the extent practicable." The report also stated that "[a]t the projected rate of expenditure of funds, OETC estimates that the allocated funds will be expended before the middle of December, 1997." (R4, tab 40)

29. By letter dated 4 December 1997, OETC informed the contract administrator that:

As of December 1 [1997], through expenditure or obligation of funds, all that remains of the \$1,142,000.00 allocated for this contract is a little over \$2,000.00. Consequently, OETC has suspended expenditure of effort on the RTIR Project until the matter of funding is resolved.

(R4, tab 49)

30. The PCO responded to the above notice in a letter dated 22 December 1997 (R4, tab 58) asking OETC to make various submittals including “realistic” cost and schedule proposals for various tasks relating to the 256x256 TPA. The record does not contain a substantive response from OETC to that request. However, on 17 January 1998 OETC provided estimates for certain discrete tasks. (R4, tabs 48, 55)

31. Additional funds were allotted to the contract under bilateral contract Modification Nos. P00010 and P00011, dated, respectively, 27 January 1998 and 20 April 1998. The stated purpose of both modifications was to “increase the estimated cost and fixed fee to recognize a cost growth in Option One.” Under contract Modification No. P00010, the estimated cost and fixed fee for the Option No. 1 work were increased by a total of \$40,238 and additional funds, in the same amount, were allotted to the contract. In contract Modification No. P00011, the increases in estimated cost and fixed fee totaled \$3,984 and the funds allotted to the contract were increased by the same amount. (R4, tabs 11, 12)

32. Contract Modification Nos. P00010 and P00011 extended the completion dates for work under Option No. 1 to 31 March 1998 and 1 June 1998, respectively. Both modifications stated that, in the estimate of the parties, the funds allotted to the contract would “cover the cost of performance” through the extended completion dates. (R4, tabs 11, 12)

#### Termination Settlement Expenses

33. The TSP originally submitted by OETC on 7 May 1999 (R4, tab 22) sought recovery of settlement expenses in the amount of \$23,066. That amount was increased to \$28,548 in the modified TSP, dated 31 October 2000 (R4, tab 16).

34. The termination settlement expenses are addressed in Attachments 1 and 2 to the modified TSP. Attachment 1 (Termination Costs Incurred) lists these expenses in lump sum amounts, by month, for the period June, 1998-June, 2000, allocated between “Inventory” (\$16,072) and “Other” (\$12,477). The record does not describe the activities comprising these categories and does not break down the monthly lump sum amounts.

35. Attachment 1 to the modified TSP contains a “References” column listing paragraph numbers in Attachment 2 (“Government Directed Termination Actions”) alongside the monthly expense amounts. Most of the references are to ¶ 2 of Attachment 2 which lists the tasks performed by OETC for settlement of the contract termination. Neither attachment, however, sets forth either the particular work performed in the individual months or computations supporting the claimed amounts.

36. The notice of termination of the contract (R4, tab 13) listed various actions to be taken by OETC including accounting for, and delivery of, termination inventory to the Government. The subsequent letter to OETC from DCMD, dated 18 June 1999, designated the TCO and requested the submission of the TSP (R4, tab 23).

37. The record also contains cost reports compiled by OETC for the period June, 1998 – August, 2000 (R4, tab 27, subtab 1). These reports show total incurred costs for that period of \$35,547. There is no explanation in the record for the difference between that amount and the \$28,548 set forth in the modified TSP as the total termination settlement expense (finding 33).

38. The cost reports set forth the amounts of direct labor costs incurred by named OETC employees and associated indirect costs. Lacking from the reports are descriptions of work performed by the named employees. However, from piecing together data from Attachments 1 and 2, the cost reports, and the other documents in the record referred to below, we find that the claimed costs are supported to the extent of \$15,042, as follows:

<u>Month</u>	<u>Services</u>	<u>Incurred Cost</u>	<u>References</u>
June, 1998	Analysis of TCO’s Request for TSP	\$164	R4, tab 23
July, 1998	Inventory of Government-owned material	\$435	Attachment 2, ¶ 3
March, 1999	Preparation of TSP	\$2,292	Attachment 2, ¶2; R4, tab 22
April, 1999	Preparation of TSP	\$3,336	Attachment 2, ¶ 2; R4, tab 22
June, 1999	Assistance to DCAA audit of TSP	\$1,469	Attachment 2, ¶¶ 9, 10; R4, tab 62
October, 1999	Responses to Requests from Plant Clearance Officer	\$649	Attachment 2, ¶¶ 11, 12; R4, tab 21
November, 1999	Responses to Requests from Plant Clearance Officer	\$1,217	Attachment 2, ¶¶ 11, 12; R4, tab 21
January, 2000	Conferences with TCO	\$1,276	Attachment 2, ¶¶ 13, 14;

	regarding indirect costs and Government settlement proposal		R4, tab 20
May, 2000	Services relating to determination of fixed fee amount due.	\$425	Attachment 2, ¶¶ 15, 16
June, 2000	Review of TCO's settlement offer	\$1,276	Attachment 2, ¶ 17; R4, tab 19
July, 2000	Response to TCO's settlement offer	\$1,425	Attachment 2, ¶ 17; R4, tab 18
August, 2000	Preparation of requested inventory costing information	\$1,078	R4, tab 67
<u>Total Incurred Cost</u>		\$15,042	

39. The government issued several written directions to OETC concerning disposition of government-owned property. By letter dated 18 June 1998, the PCO requested OETC to deliver certain government-owned materials acquired during the contract. The PCO stated that a job order number would be furnished to cover all shipping charges (R4, tab 26 at 57). By letter dated 19 October 1999, the DCMC plant clearance officer directed OETC to ship all of the termination inventory, except for certain electronic parts, to the Government. Packing, crating, and transportation charges for these materials were to be treated as settlement expenses (R4, tab 27 at subtab 4). The record indicates that the materials were shipped to, and received by, the Government (R4, tab 16 attach. 2 at 8). However, OETC has not expressly claimed any expenses of packing, crating, or shipping government-owned materials. OETC also does not dispute the statement, made in the government's response to interrogatories propounded by OETC, that the government had not received "any invoices and/or receipts evidencing shipping costs" incurred by OETC with respect to government-owned equipment (R4, tab 26 at 43). On that record, no allowance can be made for those costs. Accordingly, the total amount of substantiated termination settlement expenses incurred by OETC is \$15,042 as set forth above (finding 38).

#### Fixed Fee

40. Paragraph (g) of FAR 52.249-6, TERMINATION (COST-REIMBURSEMENT) (MAY 1986) specifies how the amounts due the contractor are to be determined in the event that the parties "fail to agree in whole or in part on the amount of costs and/or fee to be paid because of the termination of work." Paragraph (g)(4) provides for payment of:

A portion of the fee payable under the contract, determined as follows:

(i) If the contract is terminated for the convenience of the Government, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the contract, but excluding subcontract effort included in subcontractors' termination proposals, less previous payments for fee.

41. Subsequent to the contract termination, an industrial specialist employed by DCMC was assigned to evaluate the status of work performed under the contract and to advise the TCO as to the percentage of physical completion of the contract attained at the time of contract termination. The record contains a memorandum prepared by the industrial specialist describing the work which had been completed prior to termination, the work which was in progress at that time, and the planned work which had not been started, primarily because of lack of funding. (R4, tab 63)

42. The industrial specialist concluded that the percentage of completion of the contract work attained at the time of termination was 80 percent. OETC disputes the 80 percent completion percentage but has not proposed an alternative figure (appellant's comments on resp. br at 2, ¶ 4). On that record, we find as fact that the contract work was 80 percent complete at the time of contract termination.

43. The TCO applied the 80 percent completion percentage to the total amount of \$65,447 allotted to the contract for payment of fixed fee and determined that \$52,358 was payable as fixed fee for performance of the terminated contract (R4, tab 15 attach. at 7). OETC contends that the correct amount of earned fixed fee is \$65,348.94. That amount is composed of the full amounts of fixed fee for the base period work and Option No. 1, which OETC erroneously computes as \$58,559<sup>5</sup>, plus a portion of the stated fixed fee for Option No. 2 (\$31,498) in the amount of \$6,789.94 (R4, tab 27 at subtab 6).

#### The Contracting Officer's Decision

44. In a letter dated 12 June 2000, the TCO rejected the a net settlement of \$1,249,818 proposed in the original TSP as exceeding the government cost reimbursement obligations under the LOF clause. That letter was accompanied by a proposed contract modification settling the termination for the total amount allotted to, and previously paid under, the contract, namely, \$1,186,222 (R4, tab 19). OETC rejected that offer in a letter

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<sup>5</sup> The correct amount is \$58,845, comprised of \$26,782 (Base Period) plus \$32,063 (Option No. 1) (finding 3).

of 7 July 2000, stating that it was entitled to payment of \$52,177 over and above the total amount allotted to, and paid under, the contract (R4, tab 18).

45. In a letter dated 11 October 2000, the TCO responded that after reviewing OETC's letter of 7 July 2000, she had determined that "[OETC] is not owed additional costs" and that the government "is not obligated to reimburse the contractor for costs incurred in excess of the amount funded to the contract" (R4, tab 17). OETC subsequently submitted the modified TSP, dated 31 October 2000 seeking an additional payment of \$47,116 (findings 37, 39). In a letter dated 20 November 2000 (finding 11), the TCO reiterated her earlier stated position and gave notice of an intention to issue a final decision in the amount of \$1,186,222 - the total amount allotted to the contract. OETC was told to submit any additional information desired to be considered by the TCO no later than 8 December 2000.

46. OETC responded by letter dated 7 December 2000 again asserting the request for an additional payment of \$47,116 and setting forth various actions and events under the contract as supporting entitlement to that payment (R4, tab 24). This was followed by OETC's letter of 15 December 2000 setting forth additional matters, supplemented with documents, in further support of entitlement to an additional payment of \$47,116. That letter asks the TCO to recognize, in the light of the data provided, that "OETC is properly \$47,116 in final settlement of the subject contract." (R4, tab 25).

47. On the foregoing record, we find as fact that the repeated and persistent demands by OETC for an additional payment, which were met by persistent refusals by the TCO to agree to any payment in excess of the funds previously allotted to the contract, resulted in an impasse in negotiations concerning the settlement of the convenience termination which existed at the time of OETC's last communication to the TCO, dated 15 December 2000. The record does not indicate the date on which the letter of 15 December 2000 was actually received by the TCO. However, in the normal course of the mails, that would have occurred on 19 December 2000.

48. On 1 February 2001, the TCO issued a written decision, pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, determining that the amount owed for settlement of the termination was \$1,186,222 of which \$52,358 was the amount allowed for fixed fee. Accordingly, the TCO ruled that OETC was not entitled to any additional payment. (R4, tab 15) This timely appeal followed.

#### DECISION

In the written decision which led to this appeal, the TCO determined that the total amount allotted to the contract, namely, \$1,186,222, was the amount payable in settlement of the convenience termination (findings 4, 48). The allotted amount was composed of \$1,120,775 designated for cost reimbursement and \$65,447 designated for fixed-fee

payment (finding 4). OETC, however, had claimed pre-termination costs and fixed-fee of \$1,205,290 (resulting in a balance due of \$19,068) and termination settlement expenses of \$28,048 which, allowing for a credit of \$500, resulted in a balance due of \$47,116 (finding 7).

In its Rule 11 brief, OETC claims a balance due for pre-termination costs and fee of \$20,475 and termination settlement expenses of \$29,559 which, after allowance of the \$500 credit, results in a total due of \$50,034 (br. at 2-3). The government asserts that the Board lacks jurisdiction of the appeal to the extent of the difference between the amount claimed (\$47,116) and that set forth in the brief. The increase of \$2,918 evidently resulted from additional information obtained and refinements made during the substantial interval between submission of the modified TSP and the litigation of this appeal. There is no indication that the increase results from a change in the operative facts underlying this claim. In these circumstances, the difference in amounts does not affect our jurisdiction over this claim. *Tecom, Inc. v. United States*, 732 F.2d 935, 937-38 (Fed. Cir. 1984); *Contel Advanced Systems, Inc.*, ASBCA Nos. 50648 *et al.*, 03-2 BCA ¶ 32,277 at 159,696.

The TCO determined that the convenience termination settlement amount was limited to the total amount allotted to the contract, namely, \$1,186,222. The grounds for that determination were OETC's failure to give notice of anticipated excess costs in accordance with the LOF clause and the fact that the funds allotted to the contract had not been increased so as to cover the added costs (findings 11, 15). OETC contends that it complied with the notice requirements by providing cost reports throughout the contract as part of the vouchers for reimbursement of cost and payment of fixed fee (finding 13; R4, tab 24 at 4). Those cost reports, however, did not fulfill the requirements of the clause because they did not contain information as to the "estimated amount of additional funds required to continue performance specified in the Schedule" (finding 12 at (c), see also (d)). *Falcon Research & Development Co.*, ASBCA No. 26853, 87-1 BCA ¶ 19,458 at 98,336-37, *aff'd*, 831 F.2d 1056 (Fed. Cir. 1987); *JJM Systems, Inc.*, ASBCA Nos. 51152, 52159, 03-1 BCA ¶ 32,192 at 159,110.

*Indirect Cost Adjustments* - OETC contends, alternatively, that the failure to comply with the notice requirements of the LOF clause did not bar reimbursement of pre-termination costs in excess of allotted funds. That contention is first made on behalf of reimbursement of the indirect cost adjustments for FY 1997 and 1998 totaling \$9,665. These were first claimed after the termination of the contract (finding 17). OETC asserts that it is entitled to such reimbursement by virtue of an implied obligation under cost-reimbursement type contracts for each party to "refund to the other party the difference in indirect cost resulting from any difference in the provisional and audited indirect rates" (app. br. at 5).

Such an implied obligation is precluded by ¶ (d)(3) of the FAR 52.216-7 ALLOWABLE COST AND PAYMENT clause of the contract which provides that any agreement as to final indirect cost rates for a given fiscal year “shall not change any monetary ceiling . . . provided for in this contract.” Such a ceiling is imposed by ¶¶ (f) and (h) of the LOF clause limiting the government’s cost reimbursement obligation to the “total amount allotted by the Government to this contract” (finding 15). We have held that the payment of any additional amount resulting from final overhead rate negotiations is subject to the LOF or LIMITATION OF COST clauses, as applicable. *Planning & Human Systems, Inc.*, ASBCA No. 44013, 94-1 BCA ¶ 26,376 at 131,186, *aff’d on recon.*, 94-2 BCA ¶ 26,860, *aff’d*, 56 F.3d 80 (Fed. Cir. 1995) (table). Accordingly, the government’s obligation to reimburse OETC for the indirect cost adjustment for FYs 1997 and 1998 was limited by the funds allotted to the contract for reimbursement of cost.

The indirect cost adjustment would nonetheless be reimbursable without regard to the amount of funds allotted to the contract if OETC had shown that the differences between the provisional and final negotiated indirect cost rates for FYs 1997 and 1998 were not reasonably foreseeable at the times that those costs were being incurred, thereby excusing OETC from timely giving notice of those anticipated costs pursuant to ¶ (c) of the LOF clause. *General Electric Co. v. United States*, 440 F.2d 420, 425 (Ct. Cl. 1971). OETC, which had the burden of proof on that issue, has not made that showing. *Moshman Associates, Inc.*, ASBCA No. 52868, 02-1 BCA ¶ 31,852 at 157,410. The differences between the provisional and final rates for FYs 1997 and 1998, themselves, do not suggest that the final rates were not reasonably foreseeable (findings 18, 19). Based on the foregoing, we hold the PCO acted within his authority in refusing to allot additional funds for reimbursement of indirect cost adjustments for FYs 1997 and 1998 (finding 11). *Research Applications, Inc.*, ASBCA No. 23834, 79-2 BCA ¶ 14,120 at 69,469.

*Remaining Excess Pre-termination Costs* – OETC appears to argue that it should not be precluded from reimbursement of these excess costs because of failure to give notice under the LOF clause inasmuch as it was proceeding with redirected work in reliance on promises of additional funding repeatedly made by the COR (app. br. at 4-5). That argument fails on several bases.

First, OETC was not entitled to proceed with changed work on the basis of directions and funding promises from the COR. OETC was explicitly informed, in several clauses of the contract, that the COR lacked authority to issue such directions and that any requests from the COR for such work were to be referred to the contracting officer. Work pursuant to any such request was to be held in abeyance pending issuance of a contract change by the contracting officer. (Findings 23-25)

It was also unreasonable, in the circumstances, for OETC not to have given timely notice under the LOF clause which would have been due sometime prior to 31 July 1997. As of that date, almost six months had expired without fulfillment of the promises of

additional funding first made by the COR in January, 1997 (findings 21, 22). Likewise, no additional funds had been allotted to the contract as a consequence of the changes issued by the PCO in March, 1997 (finding 26).

The only work performed by OETC in response to the COR's directions was that relating to the 256x256 TPA (findings 21, 26). The record affirmatively shows that the excess pre-termination costs were not incurred for that work during February to October 1997. The excess costs were first incurred in March and April, 1998. (Finding 14) In bilateral contract Modification Nos. P00010 and P00011 dated, respectively, 27 January 1998 and 20 April 1998, additional funds were allotted to Option No. 1, the scope of which included the work relating to the 256x256 TPA (findings 26, 31).

In those modifications, the parties agreed to estimates that the funds provided would "cover the cost of performance" through the extended completion dates for the Option No. 1 work of 31 March 1998 under contract Modification No. P00010 and, thereafter, 1 June 1998 pursuant to Modification No. P00011 (finding 32). Those agreements eliminated the 256x256 TPA work as a separate source of excess costs. Contract Modification No. P00011 is especially persuasive in that regard because it was entered into on 20 April 1998, during the period in which the excess costs were being incurred.

The purpose of the notice requirement in the LOF clause is to enable the parties to "determine their future course of dealing before the estimated cost has been exceeded and, if performance is to continue, to set the amount of the additional cost." *Advanced Materials, Inc. v. Perry*, 108 F.3d 307, 310-11 (Fed. Cir. 1997). OETC did not give such notice in compliance with the contract and has shown no basis to be excused from such compliance. To the extent notice may have been given in connection with the negotiation of Modification Nos. P00010 and P00011, appellant still was not entitled to exceed the allotted funding. On that record, we hold that the TCO acted properly in refusing reimbursement of the excess pre-termination costs.

*Termination Settlement Expenses* – The LOF clause provides in ¶ (h) that in the absence of notice from the contracting officer that allotted funds have been increased in a specified amount, the "Government is not obligated to reimburse the Contractor for any costs in excess of the total amount allotted by the Government to this contract, whether incurred during the course of the contract or as a result of termination" (finding 15). As of 19 May 1998, the date of termination of the contract, OETC had incurred total costs and fee exceeding the funds allotted to the contract with the result that no funds remained for payment of expenses relating to the settlement of the termination (finding 14). The PCO knew, or had reason to know, that fact when he issued the termination notice. The excess cost condition was reported in Voucher No. 29, covering the month ending 31 March 1998 (finding 14). That voucher, dated 3 May 1998, a copy of which had been furnished to the PCO (finding 13), showed that the total incurred costs (\$1,130,748) exceeded the total amount finally allotted to the contract for cost reimbursement (\$1,120,775) (finding 14).

We cannot determine from the record when DCMC or the TCO were actually informed or told that there were no allotted funds remaining for termination settlement expenses (finding 5). That information, however, was reasonably necessary for the termination settlement function and authority delegated to DCMC, especially in view of the direction given in FAR 32.704(b) that the contracting officer “ensure availability of funds for directed actions.” Accordingly, said information should have been communicated to DCMC and, in turn, to the TCO in conjunction with the delegation of authority for termination settlement. By reason of that duty, that communication will be deemed to have been effected and knowledge of that information thus imputed to the TCO, as of 1 June 1998, the date of the letter delegating the settlement function to DCMC. *Slingsby Aviation, Limited*, ASBCA No. 50473, 03-1 BCA ¶ 32,252 at 159,479.

Based on the foregoing, OETC could reasonably assume that when issuing directions regarding settlement of the termination, the PCO and TCO were aware that no allotted funds remained to cover the costs of implementing the same. On that basis, OETC could reasonably interpret the termination directives as implying the government’s promise of reimbursement of the associated incurred costs. *Breed Corp. v. United States*, 223 Ct. Cl. 702, 27 CCF ¶ 80,333 at 85,462 (1980); *see also, HTC Industries, Inc.*, ASBCA No. 40562, 93-1 BCA ¶ 25,560 at 127,312, *aff’d on recon.*, 93-2 BCA ¶ 25,701, *aff’d*, 22 F.3d 1103 (Fed. Cir. 1994) (table), *cert. denied*, 513 U.S. 868 (1994) (reimbursement allowed for expenses exceeding allotted funds which were incurred in complying with directions in the termination notice).

OETC incurred substantiated termination settlement expenses totaling \$15,042 (finding 38). The portion of those costs incurred through May 2000, totaling \$11,263, are additionally reimbursable. Reimbursement, from the government is not available for the remaining costs incurred during June–August, 2000, totaling \$3,779. (Finding 38) The TCO’s letter of 12 June 2000 refused payment of any costs in excess of allotted funds (finding 44). After that refusal, agreement by the government to reimburse OETC for termination settlement activities could no longer be implied. *Breed Corp., supra*. On that basis, the costs incurred during June–August, 2000, totaling \$3,779, were for OETC’s own account.

*Fixed Fee* - In the written decision resulting in this appeal, the TCO determined that OETC was entitled to fixed fee in the total amount of \$52,358 which was computed by applying the percentage of completion of the contract attained at the time of termination, namely, 80 percent, to the total amount of \$65,447 allotted to the contract for payment of fixed fee (findings 4, 48). Computation of the fee on the basis of the amount of funds allotted to the contract for that purpose was erroneous inasmuch as ¶ (g)(4) of the FAR 52.249-6 TERMINATION (COST-REIMBURSEMENT) (MAY 1986) clause of the contract describes the amount due as “[a] portion of the fee *payable* under the contract” (emphasis added).

The total amount of fixed fee payable under the contract was \$90,343. This is the sum of the individually stated fixed fees for the base period and for Option Nos. 1 and 2, both of which were exercised. (Findings 2, 3) Applying the attained 80 percent completion to \$90,343 yields \$72,274. OETC is not entitled, however, to payment of that entire amount. The parties agreed in contract Modification No. P00011 that “the amount currently available for payment. . . is limited to \$1,186,222, inclusive of fee.” That amount was composed of \$1,120,775 allotted for cost and \$65,447 for fee (finding 4). The effect of these provisions “providing for an express allocation of fund allotment between costs and fees,” was to create a separate limitation so that a maximum of \$65,447 was available for payment of fixed fee. *Textron Defense Systems v. Widnall*, 143 F.3d 1465, 1469 (Fed. Cir. 1998). As a consequence, the fixed fee computed under ¶ (g)(4) of the FAR 52.249-6 TERMINATION (COST-REIMBURSEMENT) (MAY 1986) clause in the amount of \$72,274 is payable only to the extent of \$65,447.

*Accrual of CDA Interest* – Section 12 of the Contract Disputes Act (CDA), 41 U.S.C. § 611 provides that “[i]nterest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim.” In the present case, OETC submitted a termination settlement proposal, as modified in October 2000, for an additional payment of \$47,116. Throughout the discussions of that request, which began in June, 2000, the TCO consistently took the position that no additional amount was owed under the contract and OETC was not entitled to any additional payment. OETC repeatedly rejected that view and insisted on its entitlement to such payment. Under those facts, we have found that as of 15 December 2000, the parties were at an impasse in the negotiations for the settlement of the convenience termination. (Findings 44-47). In the context of that impasse, OETC’s letter of 15 December 2000 to the TCO reiterating the position that OETC “is properly due \$47,116 in final settlement of the subject contract”, amounted to a request for issuance of the contracting officer’s decision promised in the TCO’s letter of 20 November 2000 (finding 45). That implicit request served to convert the modified TSP into a monetary claim for \$47,116 as of 15 December 2000. *James M. Ellett Construction Co., Inc. v. United States*, 93 F.3d 1537, 1544 (Fed. Cir. 1996). Accordingly, we hold that interest under the CDA on the amount awarded to OETC in this decision is payable from 19 December 2000, the date of receipt of OETC’s letter dated 15 December 2000 (finding 47).

## CONCLUSION

For the reasons set forth above, OETC’s appeal from denial of its claim for additional compensation in settlement of the convenience termination is sustained to the extent of \$11,263 for termination settlement expenses. OETC shall be paid that amount

plus interest under the CDA, 41 U.S.C. § 611, from 19 December 2000. The appeal is denied in all other respects.

Dated: 27 April 2004

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PENIEL MOED  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53350, Appeal of Optical E.T.C., Inc., rendered in conformance with the Board's Charter.

Dated:

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DAVID V. HOUPE  
Acting Recorder, Armed Services  
Board of Contract Appeals